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No. 82-708
IN THE

Supreme Court of the United States

October Term, 1982

SUMMA CORPORATION,

Petitioner,

vs.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

RESPONDENT'S BRIEF IN OPPOSITION.

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Questions Presented.

1. Where precedent established by this Court as early as 1900 holds that a patent issued by the United States in confirmation of a title derived from a Mexican grant is merely a recognition of that preexisting title and is not an original source of title, and where that same precedent is consistent in establishing the principle that for this reason no federal question is involved in determining rights to such land, should this Court consider such a state-law question on a writ of certiorari?

2. Where, pursuant to this Court's conclusion that no federal question is involved in determining the nature and quality of title of a Mexican confirmatory patentee, a state supreme court has applied state law to articulate rights to such land, does this Court have jurisdiction to consider this state-law decision on a writ of certiorari?

3. Where the confirmatory patent issued to petitioner's predecessors contains repeated references to the existence of an "inner bay" in its property description and an extensive lagoon is shown on the plat incorporated into the patent, is it a collateral attack on the patent to allow proof of the lagoon's existence to clarify the ambiguity arising when the patent is considered in light of statements made in proceedings leading to the issuance of the patent?

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STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION.

Respondent State of California ex rel. State Lands Commission hereby submits its brief in opposition to the petition for a writ of certiorari, which seeks review of the decision of the California Supreme Court in this case.

Opinion Below.

The opinion of the California Supreme Court is reported at (1982) 31 Cal.3d 288, 644 P.2d 792, 182 Cal.Rptr. 599.[1]

[1]The opinion of the Court of Appeal, an intermediate state court, was superseded by the granting of a hearing by the California Supreme Court. This vacated opinion was therefore not published in the Official Reports in accordance with California Rules of Court, Rule 976(d).

Jurisdiction.

Petitioner seeks to invoke this Court's jurisdiction under 28 United States Code section 1257(3). For the reasons set forth below, this Court lacks jurisdiction to consider the questions raised in the petition.

Statute Involved.

For purposes of the jurisdictional question, consideration of 28 United States Code section 1257(3) is required:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> ". . . .
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Additionally, respondent will make reference to the Treaty of Guadalupe Hidalgo (9 Stat. 922) and the Act of March 3, 1851 (9 Stat. 631), set forth in Petitioner's Appendix, pp. A-90 - A-114, only to demonstrate that neither is involved in the instant case.

Statement.

Under settled California law, a person possessing fee title to tide or submerged lands[2] holds that title subject to a public trust easement for purposes of commerce, navigation and

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[2] "Tidelands" are lands between the line of mean high tide and mean low tide; "submerged lands" are those seaward of mean low tide. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 478 n. 13, 476 P.2d 423, 434 n. 13, 91 Cal.Rptr. 23, 34 n. 13.)

fisheries. (*City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 606 P.2d 362, 162 Cal.Rptr. 327, cert. denied, 449 U.S. 840; *Marks v. Whitney* (1971) 6 Cal.3d 251, 491 P.2d 374, 98 Cal.Rptr. 790; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 476 P.2d 423, 91 Cal.Rptr. 23; *People v. California Fish Co.* (1913) 166 Cal. 576, 138 P. 79; *Forestier v. Johnson* (1912) 164 Cal. 24, 127 P. 156; *Oakland v. Oakland Waterfront Co.* (1897) 118 Cal. 160, 50 P. 277.)

This is the case even though the patent conveying fee title to the property does not contain an explicit reservation of this interest. (See, *e.g., City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 606 P.2d 362, 162 Cal.Rptr. 327, cert. denied, 449 U.S. 840; *People v. California Fish Co.* (1913) 166 Cal. 576, 138 P. 79.)

The reason for this implied-in-law easement is twofold. It stems from a recognition of the unique character of tide and submerged lands, and the fact that under the common law all such property is subject to the public right to use the waters. (See, *e.g., Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387; *People v. Kerber* (1908) 152 Cal. 731, 93 P. 878.)

Indeed, legal systems since the Roman Empire have similarly treated such lands. (*City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 521, 606 P.2d 362, 364-365, 162 Cal.Rptr. 327, 329-330, cert. denied, 449 U.S. 840; Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right* (1980) 14 U.C. Davis L. Rev. 195, 196-198; Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine* (1970) 79 Yale L.J. 762, 763-772.)

The holder of fee title to such lands has the right to make any use of the property he sees fit in the absence of the

exercise of the retained public trust easement. (*State of California v. Superior Court (Fogerty)* (1981) 29 Cal.3d 240, 249, 625 P.2d 256, 261, 172 Cal.Rptr. 713, 718-719, cert. denied, 454 U.S. 865; *State of California v. Superior Court (Lyon)* (1981) 29 Cal.3d 210, 232, 625 P.2d 239, 252, 172 Cal.Rptr. 696, 709, cert. denied, 454 U.S. 865; *Newcomb v. City of Newport Beach* (1936) 7 Cal.2d 393, 402, 60 P.2d 825, 829; *People v. California Fish Co.* (1913) 166 Cal. 576, 599, 138 P. 79, 88.) And where improvements have been placed or constructed on such lands by the fee title owner, the State must compensate the owner for such improvements before exercising the trust. (Calif. Pub. Res. Code § 6312; *People v. California Fish Co.* (1913) 166 Cal. 576, 599, 138 P. 79, 88.) (Petitioner has acknowledged this fact (Pet., p. ii, n. 1),[3] by noting that although Southern California Gas Company had been a party to the proceedings below on the basis of its ownership of a pipeline easement, it has elected not to pursue further review of the state court judgment, satisfied that its improvements are protected by the compensation provided for in California Public Resources Code section 6312.)

Indeed, cities have been built on such lands in California notwithstanding the quality of the fee title by which they are held. (*City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 524, 606 P.2d 362, 367, 162 Cal.Rptr. 327, 332, cert. denied, 449 U.S. 840; Note, *Increased Public Trust Protection for California's Tidelands — City of Berkeley v. Superior Court* (1980) 14 U.C. Davis L. Rev. 399, 424-426.)

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[3] "Pet." refers to the petition for a writ of certiorari filed by petitioner in the instant case. "App." refers to petitioner's appendix to its petition for a writ of certiorari. "R.T." refers to the Reporter's Transcript of the trial proceedings. "Exh." refers to the exhibits admitted into evidence at trial.

This case concerns such tide and submerged lands, an estuary referred to as Ballona Lagoon,[4] located within the Mexican land grant of Rancho La Ballona granted to Augustine and Ignacio Machado and Felipe and Tomas Talamantes in 1839. The grant set forth the following reservation:

> "They may enclose it *without prejudice* to the traversing roads and *servitudes* . . . ." (Exh. 1, pp. 20-22, Grant for Rancho La Ballona; App. A-1, p. A-9; emphasis added.)

This language of the grant was incorporated by reference into both the Decree of Confirmation issued by the Board of Land Commissioners, and the decision upholding the decree rendered by the United States District Court in the federal rancho confirmation proceedings for Rancho La Ballona. (Exh. 1, pp. 61-63, 83-84; App. A-5, p. A-58.)

At trial, expert testimony established that under Mexican law, such a reservation "represents an expression of art which appears in deeds of conveyance even today, where

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[4]Ballona Lagoon was found by the courts below to be an arm of the sea, inundated with tidewaters at both mean low and high tides. Tidegates have recently been installed to control the flooding of adjacent land, but the lagoon is still of sufficient depth to be navigable by shallow draft vessels and is the sole source of seawater for the Venice Canals. Moreover, Ballona Lagoon has value for scientific study and research as an estuarine area of ecological importance. Indeed, the waters of the lagoon are a habitat for a variety of migratory birds and marine life. Furthermore, access to the lagoon is provided by walkways surrounding the shore, public streets to the shoreline, and bridges across the lagoon. Consequently, members of the public have used Ballona Lagoon for more than five years for purposes consistent with the public trust easement such as clam-digging, swimming, boating and scenic enjoyment. (App. A-1, p. A-2; App. A-5, pp. A-52 - A-58.)

Rather than accept these factual findings made by the state courts, petitioner has made factual allegations throughout its petition (Pet., pp. 3, 4, 7, 8, 10-11) which are not supported by the findings of the courts below, some of which in fact were rejected by the courts below, and are therefore clearly improper. (See *Portland Ry. Co. v. Oregon R. R. Comm.* (1913) 229 U.S. 397, 411.)

rights of the public are saved in the conveyance of large tracts by the authorities." (R.T. 1085; emphasis added.) Furthermore, the expert established that the public rights of common usage contained in Las Siete Partidas,[5] the law of Mexico at the time of the grant, would be considered servitudes. (R.T. 1084.)

Thus, under Mexican law, rights of the public in tide and submerged lands were not only recognized, they were safeguarded in conveyances to private parties. The California Supreme Court therefore concluded that when California was ceded by Mexico, the title of petitioner's predecessors was indeed subject to the interests of the public in the tidelands included in the grant.

Notwithstanding petitioner's insinuation to the contrary (Pet., p. 13, n. 13), the state court's conclusion that under Mexican law (Las Siete Partidas) tidelands if alienated remained subject to a retained public trust interest is correct. For example, in *Apalachicola Land & Development Co. v. McRae* (1923) 86 Fla. 393, 98 So. 505, appeal dismissed, 269 U.S. 531, the court stated:

> "[Under Las Siete Partidas] a grant or concession of lands under navigable waters and tide lands was not in accord with usual customs of the Kingdom, such lands and waters being held as res communes for the *public use*; and a conveyance of them to private ownership could be consummated only by a clear showing

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[5]Law III of Title XXVIII of Las Siete Partidas, the law in effect when California was a part of Mexico, provided, "The things which belong in common to the creatures of this world are the following, namely, the . . . sea and its shores, for every living creature can use each of these things according as it has need of them. For this reason every man can use the sea and its shore for fishing or for navigation, and for doing everything there which he thinks may be to his advantage." Law VI provided, "Rivers, harbors, and public highways belong to all persons in common . . . ." (Las Siete Partidas, CCH (Spain) (1931) pp. 820-821.)

> of express sovereign intent (see Jover y Costas v. Insular Government of the Philippine Islands, 221 U.S. 623, 31 Sup.Ct. 664, 55 L.Ed. 884); and *even this would not exclude the public use of the lands and water and the natural products thereof*[.]" (86 Fla. at 433, 98 So. at 518; emphasis added.)[6]

Again emphasizing that under Las Siete Partidas a tidelands grant conveyed fee title or "jus privatum" subject to the rights of the public or "jus publicum," the court in *Apalachicola* held:

> "[Pursuant to Las Siete Partidas if the sovereign] had granted, or had expressly authorized a grant of submerged lands below high-water mark on the bays of the sea, such a grant might under some circumstances carry a bare legal title, but not a right of private ownership in submerged lands under the waters of the bay or sea, thereby excluding navigation, fishing, the taking of oysters or other shell fish, and other purposes in which the public have an interest as of common right, subject to governmental regulation for the good of the public." (86 Fla. at 451, 98 So. at 524.)

When sovereignty over California passed to the United States in 1848, the United States was obligated by the Treaty of Guadalupe Hidalgo to respect Mexican property rights and insure that Mexicans "enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States." (9 Stat. 922, 929, Art. VIII; App. B-1, p. A-96.)

This treaty obligation was fulfilled when Congress passed the Act of March 3, 1851, "to ascertain and settle the private

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[6]From this it is seen that petitioner's reliance on *Jover v. Insular Government* (1911) 221 U.S. 623, for the proposition that Mexican law permitted alienation of tidelands without any retained public trust rights (Pet., p. 13, n. 13), is misplaced.

Land Claims in the State of California." (9 Stat. 631; App. B-2, pp. A-108 - A-114.) Petitioner's predecessors obtained confirmation of their title to Rancho La Ballona in proceedings conducted pursuant to this Act. The confirmatory patent issued as a result of these proceedings contained a plat showing Ballona Lagoon as an "inner bay" of the Pacific Ocean within the rancho and its legal description made repeated references to the "inner bay's" existence. (Patent for Rancho La Ballona, App. C-1, pp. A-115 - A-123; Plat of Rancho La Ballona, App. C-2, p. A-124.)

Despite these references to the existence of Ballona Lagoon within the rancho, despite the fact that the original Mexican title was conveyed subject to a public trust, and despite the nature of California's common law respecting title to such tidelands, petitioner argues herein that it should have a quality of title greater than that held by its predecessors under Mexican law and *more ample* than that enjoyed by citizens of the United States.

However, the cases cited by petitioner for its argument are inappropriate to the issue of the public trust's existence. In fact, the existence of the public trust easement impressed on lands under a previous sovereign is not even addressed by the cases upon which petitioner relies. Yet such cases have arisen. In those instances, it will be demonstrated below that both this Court and the California Supreme Court have recognized that the public trust easement over such lands continues to exist.

Summary of Argument.

There is no jurisdiction in this Court because the Equal Footing Doctrine issue was raised for the first time in this petition. Not having been raised, it was not decided below.

Accordingly, this Court lacks jurisdiction under 28 United States Code section 1257 to consider this issue.

Further, the real issue in this case is solely a matter of state law, conferring no jurisdiction on this Court. That issue is whether petitioner's fee title, deraigned from a Mexican rancho grant, is subject to an easement for commerce, navigation and fisheries in favor of the public in view of the fact that when petitioner's predecessors received the grant from Mexico it was subject to such rights, and in view of California's policy of upholding public trust interests.[7] This Court has consistently ruled that such questions concerning the nature and quality of titles derived from Mexico are not federal questions, but questions of state law. Significantly, these holdings have been delivered in the course of dismissing writs of error for lack of jurisdiction and affirming dismissals for want of a federal question. (*Los Angeles Milling Co. v. Los Angeles* (1910) 217 U.S. 217; *Devine v. Los Angeles* (1906) 202 U.S. 313; *Hooker v. Los Angeles* (1903) 188 U.S. 314.) Respondent submits the same action is warranted herein.

Additionally, this Court has uniformly held that public rights arising under a prior sovereign need not be presented for confirmation; petitioner's argument to the contrary is therefore unavailing. (Pet., pp. 13-15.) In fact, quite counter to petitioner's contention, the jurisdiction of the confirmatory bodies was limited and did not extend to consideration of the existence of the public trust on tidelands within

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[7]It should be noted that the trial court based its judgment on other state grounds in addition to the public trust, each of which independently sustains the existence of public rights in Ballona Lagoon. The California Supreme Court did not discuss these issues since the rights are included within the public trust. (App. A-1, p. A-16.) However, as conceded by petitioner (Pet., p. 8, n. 11), these implied-in-fact and implied-in-law public easements do exist in Ballona Lagoon by virtue of the trial court judgment. (App. A-6, pp. A-68 - A-69.)

ranchos. Presentation of this interest thus would not have served to confirm it and, conversely, the failure to present this interest could not have served to extinguish it. (*Townsend v. Greeley* (1866) 72 U.S. (5 Wall.) 326; *Fremont v. United States* (1854) 58 U.S. 541.) Indeed, public trust interests cannot be disregarded, abandoned or extinguished. (*Eldridge v. Trezevant* (1896) 160 U.S. 452; *New Orleans v. United States* (1836) 35 U.S. (10 Pet.) 662.)

Finally, the evidence proving the existence of Ballona Lagoon is not a collateral attack on the patent issued to petitioner's predecessors. The evidence merely corroborates the description and depiction of the lagoon already contained in the patent. Since the patent, the final record of the property confirmed to petitioner's predecessors, on its face describes a parcel of property containing an arm of the sea (App. C-1, pp. A-118 - A-119, A-122; App. C-2, p. A-124), petitioner should not now be heard to complain that federal surveys also depict the lagoon, and core samples attest to its age, especially since petitioner itself does not dispute the lagoon's existence.

REASONS WHY THE WRIT SHOULD BE DENIED.

I.

Petitioner Did Not Raise Below the Equal Footing Doctrine Question.

This Court lacks jurisdiction to consider a federal question under 28 United States Code section 1257 unless that question was raised and decided below. (*Cardinale v. Louisiana* (1969) 394 U.S. 437, 438.) Here the question posed by petitioner respecting the Equal Footing Doctrine was neither raised nor decided below.

Petitioner states that an analysis of the Equal Footing Doctrine is central to a determination of whether its property is subject to a public trust. (Pet., pp. 2, 12.) This doctrine, however, was never raised as a federal question or in any other manner by petitioner at any point in the state proceedings, even in its petition for rehearing in the California Supreme Court.

Furthermore, there is absolutely nothing in the state court's opinion that indicates the court considered the Equal Footing Doctrine as an issue in the case, or more particularly, as invoking a federal question. Certainly petitioner did not make it an issue, nor does petitioner now claim that it did. Rather, the entire case below was based on an analysis of petitioner's title and not an examination of the quality or nature of the State's interest or issues associated there-

with. Consequently, the Court lacks jurisdiction to consider this matter.[8]

II.

The Nature and Extent of the Property Rights of a Property Owner Whose Title Is Predicated on a Mexican Grant Is Determined by State Law. No Federal Question Is Presented.

Petitioner is attempting to raise issues long ago settled by this Court regarding the choice of law to be used in determining the nature and extent of rights conveyed to a party by a prior sovereign. (Pet., pp. 10-15.)

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[8]In any event the Equal Footing Doctrine does not of itself create a federal question because its very purpose is to put California and the other subsequently admitted states on an "equal footing" with the original thirteen states. (*Coyle v. Smith* (1911) 221 U.S. 559.) As a result, each later admitted state equally with the original thirteen has always possessed the power to formulate its own domestic body of real property law. (*Davies Warehouse Co. v. Bowles* (1944) 321 U.S. 144, 155.)

To accept petitioner's position that the Equal Footing Doctrine can itself raise a federal question would constitute a total subversion of this principle and would subject all of California's land title rules to some superior federal supervisory power inasmuch as, as noted by petitioner, "[c]onfirmed Mexican grants form the basis of title to much of the land in California." (Pet., p. 3.)

For this reason the idea that the scope and applicability of the Equal Footing Doctrine can raise a federal question was expressly rejected by this Court in *State Land Board v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363. The Court reasoned that if the Equal Footing Doctrine itself required interpretation so as to create special federal common law on the subject, all later admitted states would be treated differently from the original thirteen, there being no "Equal Footing Doctrine" applicable to them. Since the doctrine was created to insure equality among the states, this approach, according to the *Corvallis* Court, would result in a "perverse application of the equal-footing doctrine." (429 U.S. at 378.)

Most recently, *Corvallis* was specifically applied to reject a claim identical to petitioner's in the case of *Hyman v. State Lands Com'n of State of Cal.* (C.D. Cal. 1982) 543 F.Supp. 118, appeal pending 9th Cir. There the court held that the Equal Footing Doctrine does not create a federal question not only on the basis of the *Corvallis* decision, but also because the vesting of sovereignty in new states upon their admission to the Union cannot be equated to the right of ownership conveyed by a federal grant which is thereafter governed by federal law. The court explained that "grant" implies a choice on the part of the grantor to convey or not to convey, but Congress had no such choice since it was powerless to withhold from new states any aspect of sovereignty. (543 F.Supp. at 121-122 n. 4.) Petitioner's argument should therefore be rejected again herein.

Nearly 100 years ago this Court established the principle that a dispute as to the nature and extent of property rights gained under patents issued by the United States in confirmation of prior Mexican grants did not present a federal question but was a matter of state law. (*Los Angeles Milling Co. v. Los Angeles* (1910) 217 U.S. 217; *Devine v. Los Angeles* (1906) 202 U.S. 313; *Hooker v. Los Angeles* (1903) 188 U.S. 314.)

Like the instant case, *L.A. Milling* and *Hooker* were before this Court to review decisions of the California Supreme Court determining rights in property. In *Devine*, the action had been filed in federal court and dismissed for want of a federal question. In each case the parties claimed under Mexican land grants recognized by confirmatory patents of the United States. This Court dismissed the writs of error in *L.A. Milling* and *Hooker* for lack of jurisdiction and affirmed the lower court's dismissal in *Devine*, declaring that the invocation of the Treaty of Guadalupe Hidalgo, the Act of March 3, 1851, and a United States patent issued pursuant to the Act all failed to raise federal questions.

It should be noted that these were quiet title actions concerning the nature and extent of water rights in those portions of the Los Angeles river running through property conceded to be privately owned but as to which the city claimed rights for the public. Likewise in this case, fee title to the property is not in issue; the only issues raised concern the nature and extent of petitioner's rights in the property vis-a-vis the public.

In *L.A. Milling*, *Hooker*, and *Devine*, the Court analyzed each of the sources of federal jurisdiction urged by the private parties and rejected each for the following reasons:

(1) The Treaty of Guadalupe Hidalgo does not require the application of federal law because the controversy does not involve construction of the treaty, but rather

determination of the rights which in fact existed under Mexican law that were protected by the treaty. (188 U.S. at 318.)

(2) The Act of March 3, 1851, is not the source of the applicability of federal law because neither its validity nor its construction has been challenged. Furthermore, the Act did not originate federal rights or titles. The Act established the mechanism by which preexisting Mexican property claims would be confirmed by the United States through the issuance of a patent. (202 U.S. at 337.)

(3) Determination of the nature and quality of title gained under patents issued pursuant to the Act does not rest on federal law because such patents are not original sources of private titles, but are merely confirmatory of rights already accrued under the former sovereign. (217 U.S. at 233.)[9]

Thus the treaty, the federal Act and the patent do not raise federal questions because their validity is not being challenged and because they did not create independent sources of title requiring interpretation under federal law. Rather questions as to the nature and extent of a confirmee's property rights were specifically left for state law determination. This Court has expressly so held:

> "In truth, the questions as to the nature and extent of complainants' titles or rights, [derived from Mexico by virtue of grants to their predecessors and confirmed

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[9]In *Boquillas Cattle Co. v. Curtis* (1909) 213 U.S. 339, and *Adam v. Norris* (1880) 103 U.S. 591, 593, this Court had previously squarely held that by its confirmatory patent the United States did not pass a federal title or grant or convey a federal interest, stating in *Boquillas*:

> "[W]hile it is true that in *Beard v. Federy*, . . . Mr. Justice Field calls such a patent a quit-claim, we think it rather should be described as a confirmation in a strict sense." (213 U.S. at 344.)

by the United States through its patent], are not Federal questions, but questions of state or general law.

"In *Hooker v. Los Angeles, supra*, it was contended that the decision of the state court against the claim of plaintiffs in error to certain riparian rights and in certain alleged percolating waters, which rights were alleged to be derived from a patent of the United States, and confirmed Mexican grants, was a decision against a title, right, privilege, or immunity claimed under the Constitution or some statute or treaty of the United States, and so reviewable here. But this court held otherwise, and we said:

" 'Obviously, the question as to the title or right of plaintiffs in error in the land, and whatever appertained thereto, was one of state law and of general public law, on which the decision of the state court was final. . . .' " (202 U.S. at 337.)

Just eight months ago this principle was again reaffirmed in *Hyman v. State Lands Com'n of State of Cal.* (C.D. Cal. 1982) 543 F.Supp. 118, appeal pending 9th Cir., a case substantially similar to the case at bar. As herein, plaintiffs in *Hyman* attempted to raise in federal court the issue of whether a public trust exists on tide and submerged land located within a former Mexican rancho. The body of water involved in *Hyman* was Del Rey Lagoon, a portion of the same historic Ballona Lagoon as is the subject matter of the instant case. Moreover, plaintiffs in *Hyman* traced their title to the same Mexican rancho grant as does petitioner herein, and, indeed, claimed federal jurisdiction by virtue of the same federal confirmatory patent as does petitioner herein.

In an opinion relying on the authority articulated by this Court in the above line of cases, Judge Mariana Pfaelzer concluded that no federal question is raised by the issue of whether, as a matter of state common law, a public trust

exists on tidal, submerged lands located within a confirmed Mexican rancho. The court stated:

> "Supreme Court precedent, from 1900 to 1977, is controlling here. It is consistent in establishing the principle that no federal question is involved in determining rights to land held privately at the Mexican conquest and subsequently confirmed and patented by the United States." (543 F.Supp. at 122.)

The *Hyman* case was therefore dismissed for lack of federal jurisdiction.

Thus where, as here, title is derived from a Mexican grant the nature and extent of rights belonging to persons holding confirmatory patents is a matter of local law.

The Mexican land grant confirmatory patent case is in sharp contrast to cases wherein the original source of private title is deraigned from the United States itself, as in *Borax, Ltd. v. Los Angeles* (1935) 296 U.S. 10. In *Borax* the city brought an action to quiet its title to tidelands which it claimed under a legislative grant from the State. The defendant claimed under a patent issued by the United States to its predecessors. There the patent from the United States was not simply a confirmation of a prior Mexican grant, but an outright grant by the United States of public lands owned by it. Federal common law was therefore applied to determine the initial boundaries of the federal patent.

Noting the clear distinction between these two types of cases and the consequent inapplicability of federal law to the Mexican land grant case, such as the case at bar, the court in *Carpenter v. City of Santa Monica* (1944) 63 Cal.App.2d 772, 147 P.2d 964, stated as follows:

> "Under the authority of [Borax], if appellant claimed through a federal grant in the proper sense, there could be no doubt that the question involved would be governed by the federal and not the state law. But that rule

> only applies where title is derived from the United States. In the present case appellant did not deraign title from the United States at all. The title was predicated upon a Mexican grant. The issuance of the patent thereafter pursuant to an act of Congress was but confirmatory of the Mexican grant in performance of our government's obligations assumed under the Treaty of Guadalupe Hidalgo. The United States never had the true ownership of the property, and in no proper sense was it the grantor or the source of appellant's title. . . ." (63 Cal.App.2d at 784, 147 P.2d at 970.)

State law was therefore applied.

Likewise herein, the United States never had the true ownership of the property and in no sense was it the grantor or source of petitioner's title. Thus the issue herein concerning the nature and extent of petitioner's title or rights in property is not a federal question, but a question of state law. (*Los Angeles Milling Co. v. Los Angeles* (1910) 217 U.S. 217; *Devine v. Los Angeles* (1906) 202 U.S. 313; *Hooker v. Los Angeles* (1903) 188 U.S. 314; *Chrystal Springs Land & Water Co. v. Los Angeles* (1900) 177 U.S. 169; *Townsend v. Greeley* (1866) 72 U.S. (5 Wall.) 326; *Hyman v. State Lands Com'n of State of Cal.* (C.D. Cal. 1982) 543 F.Supp. 118, appeal pending 9th Cir.)

The decision of the California Supreme Court, resting as it does on state law, is in keeping with this Court's mandate that state courts determine the nature and quality of title held by a Mexican confirmatory patentee as a matter of state law. Thus no federal question has been presented by petitioner.

III.

The Public Trust Was Not Required to Be Presented for Confirmation Since Such Rights Were Not Within the Ambit of the Act of March 3, 1851, and Thus Not Within the Jurisidiction of the Boards Created Pursuant to It.

This Court has consistently ruled that trust interests were not within the jurisdiction of the Boards created to determine the validity of private land grants made by prior sovereigns.[10] Thus no federal question is raised by the failure of the Board of Land Commissioners to consider such an interest. (*Townsend v. Greeley* (1866) 72 U.S. (5 Wall.) 326; *Fremont v. United States* (1854) 58 U.S. 541; *New Orleans v. United States* (1836) 35 U.S. (10 Pet.) 662.)

Recognizing that public rights in waterways existed under Mexican sovereignty, petitioner argues that the public trust on Ballona Lagoon was extinguished because it was not presented to the Board of Land Commissioners for confirmation pursuant to the Act of March 3, 1851. (Pet., pp. 13-15.) Petitioner is incorrect. Under the 1851 Act, the Board of Land Commissioners was charged only with determining the validity of the fee title. Questions concerning the nature and quality of title, such as whether it was subject to a public trust, were not within the jurisdiction of the Board.

This principle was enunciated by this Court just three years after the passage of the Act. In *Fremont v. United States* (1854) 58 U.S. 541, a case concerning fee title to Rancho Mariposas, a question arose as to the right to minerals in the land. The Court held that the minerals issue had

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[10]Even petitioner concedes that trust interests were not required to be presented to the Board of Land Commissioners and that such interests were not discharged by the confirmation and subsequent patent. (Pet., p. 14, n. 18.)

to be tried separately from issues relating to the underlying fee title, reasoning that since the question of minerals had not been before the Board of Land Commissioners by the Act of 1851, its jurisdiction having been limited to fee title, the minerals issue was not properly before the Court on appeal of its decision. In the words of the Court:

> ". . . The only question before the court is the validity of the title. And whether there be any mines on this land, and, if there be any, what are the rights of the sovereignty in them, are questions which must be decided in another form of proceeding, and are not subjected to the jurisdiction of the commissioners or the court, by the act of 1851." (58 U.S. at 564.)

In *Townsend v. Greeley* (1866) 72 U.S. (5 Wall.) 326, this Court again held that only legal titles and boundaries were questions for determination in the confirmation proceedings, and that the extent of rights gained under confirmatory patents was to be determined by state law. Presentation of the public trust for confirmation thus would not have been within the jurisdiction of the Board. The Court stated:

> ". . . [T]he government provided for discharging the obligation of protection cast upon it by the stipulations of the treaty [of Guadalupe Hidalgo], and at the same time for separating private lands from the public domain. By proceedings under that act [of March 3, 1851], imperfect rights — mere equitable claims — might be converted by the decrees of the board [of Land Commissioners] or courts, and the patent of the government following, into legal titles; but whether the legal title thus secured to the patentee was to be held by him charged with any trust, was not a matter upon which either board or court was called upon to pass. If the claim was held subject to any trust, before presentation to the board, the trust was not discharged by

the confirmation and the subsequent patent. . . ." (72 U.S. (5 Wall.) at 335.)

From this it is seen that the Board of Land Commissioners did not have the jurisdiction to consider the existence of the public trust on tidelands within ranchos, and thus, contrary to petitioner's contention, the failure to present the public trust for confirmation could not have served to extinguish it.

Not only did *Townsend* articulate the Board's limited jurisdiction, dealing a fatal blow to petitioner's argument, it went further, ruling that the Treaty of Guadalupe Hidalgo did not purport to alter the character of the interests a party may have held under the former government, and that the Act of 1851 did not change the nature of estates in such land. (72 U.S. (5 Wall.) at 334, 335.) Applied to the instant case, *Fremont* and *Townsend* hold that petitioner's property, being subject to the public trust before presentation to the Board, was still held subject to the trust after the confirmation and the subsequent patent even though it was not presented for confirmation. (72 U.S. (5 Wall.) at 334, 335; 58 U.S. at 564.)

Indeed, this Court has held that even *rejection* of a public rights claim by a confirmatory board could not extinguish such rights. Such was this Court's conclusion in *New Orleans v. United States* (1836) 35 U.S. (10 Pet.) 662, where the Court held that if a public trust exists on property while under a former sovereign, upon cession the land impressed with the public trust does not pass as ordinary property which would then be public land of the United States and freely alienable. Rather, the Court observed that the property could not be sold because title to the property was vested in the United States as successor sovereign, and, since the property had been dedicated to public use by the prior sovereign, the United States acquired no right to dis-

pose of it in the manner of other public lands. Moreover, the Court noted that the right to regulate this use, and to carry out the trust, belonged to the State, such a right never having been delegated to the federal government. (35 U.S. (10 Pet.) at 736-737; accord, *City of Monterey v. Jacks* (1903) 139 Cal. 542, 73 P. 436; *Richert v. City of San Diego* (1930) 109 Cal.App. 548, 293 P. 673.) Significantly, the public rights recognized in *New Orleans* earlier had been presented to a confirmatory board, identical in purpose to California's Board of Land Commissioners, and had been rejected, and this Court still found that the public trust had not been extinguished. (35 U.S. (10 Pet.) at 733-738.)

Again in *Eldridge v. Trezevant* (1896) 160 U.S. 452, the Court recognized that a public servitude created under the rule of a prior sovereign survives the transfer of sovereignty and the confirmatory proceedings. In *Eldridge*, the public servitude involved gave the State of Louisiana the authority to construct levees across riparian property, without compensation to the landowner, where necessary to confine river waters and protect the inhabitants against inundation. The highest state court had permitted such a taking on the ground that, under French and Spanish laws existing before the State's transfer to the United States, lands abutting waterways were subject to a servitude in favor of the public. It was this servitude, now held by the State, that had been validly exercised, the court ruled. This Court affirmed. Upholding the servitude, the Court determined that the provisions of the Fourteenth Amendment to the Constitution do not override public rights existing in the form of servitudes or easements which are held by the courts of a State to be valid under its Constitution and laws. (160 U.S. at 462-466.)

The reasoning in these cases is particularly applicable to the instant case. The public trust existed under Mexican

sovereignty and was not extinguished under the Act of 1851, the combined teaching of *New Orleans* and *Eldridge* being that confirmatory proceedings are irrelevant to such an interest and that such interests, having survived, may be recognized and redefined by state law.

Thus, as in *New Orleans*, petitioner's attempt to use the confirmatory proceedings as a bar to the existence of the public trust must fail. Indeed, as in *Eldridge*, petitioner's attempt to challenge public rights held by the courts of a state to be valid under its Constitution and its laws must fail.

In view of these rulings upholding the continued existence of public rights arising under prior sovereigns, petitioner's reliance on *Barker v. Harvey* (1901) 181 U.S. 481 (Pet., pp. 14-15), is inapposite. That case concerned the claim of a band of Mission Indians, a claim held by this Court to constitute a private property claim, not one of public rights as here. Since the 1851 Act "to ascertain and settle private land claims" required presentation of all *private* claims, the Indians were duty-bound to present their claims to the Board of Land Commissioners. They did not, and this, it was held, constituted an abandonment. (181 U.S. at 489-491.)

Furthermore, the Act of 1851 specifically required the Board to investigate the right and title of Mission Indians. (9 Stat. 631 § 16; App. B-2, p. A-113.) None having been reported with respect to these particular Indians, the Court in *Barker* concluded that they had no claim. (181 U.S. at 492-493.) This was confirmed in *Cramer v. United States* (1923) 261 U.S. 219, when in the course of rejecting *Barker*, the Court observed that the Mission Indians in *Barker* had abandoned their claim prior to cession and this abandonment had been recognized by the Mexican authorities. (261 U.S. at 231-232.)

Thus *Barker v. Harvey* has no applicability here. It deals with Indians whose claims were amply provided for under the 1851 Act, and who, as a matter of fact, had no valid claim. It cannot be applied to public rights not encompassed within the Act.[11] As to public rights there can be no abandonment. (*Eldridge v. Trezevant* (1896) 160 U.S. 452; *New Orleans v. United States* (1836) 35 U.S. (10 Pet.) 662.)

IV.

The Fact That Ballona Lagoon Is an Arm of the Sea Is Not a Collateral Attack on Petitioner's Patent.

The state court's determination that Ballona Lagoon, an arm of the sea today, has been a tidal body of water for over 900 years presents no federal question nor is it a collateral attack on the patent issued to petitioner's predecessors. Indeed, its existence is shown on the plat of the rancho which the United States General Land Office certified as true and accurate, on the survey field notes approved by the General Land Office, both of which are contained in the patent (App. C-1, p. A-117), and is verified by its depiction on federal surveys conducted over 100 years ago. (R.T. 245-249; Exhs. 13-15.)

At trial, the court received testimony from experts in the fields of geology and geomorphology that Ballona Lagoon has existed at its present location since its formation at the end of the Ice Age. The experts based their conclusions on United States Coast and Geodetic surveys of the area conducted in 1876, 1887, and 1896 which proved Ballona Lagoon to have been an arm of the sea at the time petitioner states it did not exist, as well as historical photographs of the lagoon, and geological age dating experiments con-

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[11]Nor can petitioner find comfort in *United States v. Title Insurance Co.* (1924) 265 U.S. 472, which also concerned the duty of Indians to present their private land claims to the Board under the 1851 Act.

ducted on core samples taken from the subsurface of Ballona Lagoon, which results confirm the lagoon's 900-year existence. (R.T. 197, 208-209, 223-224, 236-258, 346-361, 389-390, 724-751; Exhs. 13-16, 24-34, 69-74.)

It should be noted that at trial petitioner never challenged the evidence respecting the historic existence of the lagoon and specifically did not object to the introduction of the testimony of the geologist or the geomorphologist or their supporting exhibits on the grounds herein raised.

Petitioner now alleges that this evidence constitutes a collateral attack on the patent. (Pet., pp. 15-18.) But petitioner does not call this Court's attention to the fact that the property description contained in petitioner's patent makes repeated references to the existence of an arm of the sea or "inner bay" within its boundaries (App. C-1, pp. A-117 - A-119), and that the map drawn from this legal description, also incorporated into the patent, clearly shows the presence of this extensive "inner bay." (App. C-1, p. A-122; App. C-2, p. A-124.)

Thus the final record of the property confirmed to petitioner's predecessors on its face describes a parcel of property containing an arm of the sea; that is, a body of water connected to the sea by an inlet and labeled an "inner bay." (App. C-1; App. C-2.)

Petitioner alleges that this arm of the sea does not exist. Petitioner points to an 1873 intermediate decision in the General Land Office made by Commissioner Drummond for its contention that what was surveyed by the United

States as a fully developed coastal lagoon system in 1876 did not exist just three years earlier.[12] (Pet., p. 16.)

While this makes no sense in geologic terms, it does point up a latent ambiguity. For if one accepts as a final decision Commissioner Drummond's intermediate determination that there was no arm of the sea in the rancho, it creates an ambiguity when read together with the patent, which not

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[12]Contrary to petitioner's characterization of the events at the General Land Office (Pet., p. 16), the survey of Rancho La Ballona was before the Land Office because the grantees of Rancho San Vicente y Santa Monica, the rancho abutting Rancho La Ballona on the north, filed an objection to the La Ballona survey asserting that its northern boundary encroached into their rancho. The basis for this objection was that Hancock, the surveyor, had selected the wrong natural monuments as the northeast and northwest corners of the rancho. (App. D-2, p. A-130.)

Commissioner Drummond determined that the La Ballona survey was correct and decided that the "inner bay" described in the field notes and drawn on the survey plat was not an arm of the sea; yet in absolute contradiction, he also found that the mouth of this "inner bay" emptied into the ocean. (App. D-2, pp. A-136, A-137.)

This decision was appealed by the Rancho San Vicente y Santa Monica grantees to the Secretary of the Interior. Significantly, petitioner does not refer this Court to the decision of Secretary of Interior Delano, issued on November 17, 1873, which *superseded* that of Commissioner Drummond. (*New Orleans v. Paine* (1893) 147 U.S. 261, 266; *Knight v. United States Land Association* (1891) 142 U.S. 161, 177-179.) In that decision Secretary Delano held:

> "[The decree of confirmation for Rancho La Ballona] establishes the boundary in question from point to point by reference to natural monuments and I am satisfied that these monuments are correctly located by the Hancock survey.
>
> "I therefore affirm your decision and return herewith the papers transmitted with your letter of August 12, 1873." (Exh. R.)

It is clear that Secretary Delano was only interested in the placement of the rancho's northern boundary and not in the character of the lands within the rancho or its "inner bay." However, by accepting the Hancock survey as correct, Secretary Delano also accepted the inner bay's existence within the rancho, since its description is as much a part of the survey as the description of the rancho's perimeter.

The confirmatory patent for Rancho La Ballona was then issued. The patent specifically included the description prepared by Hancock which contains repeated references to the "inner bay," as well as the survey plat which depicts it. (Exh. T; App. C-1, p. A-118 - A-119, A-122; App. C-2, p. A-124.)

only describes, but clearly depicts an "inner bay" within the rancho.[13]

Because of this ambiguity, evidence of exactly what was confirmed to petitioner's predecessors was properly admitted, not to challenge the validity of the patent or its boundaries, for a federally confirmed Mexican land grant could embrace tidelands, but only to explain what had been granted. (*Broome v. Lantz* (1930) 211 Cal. 142, 151, 294 P. 709, 713; *Ferris v. Coover* (1858) 10 Cal. 589, 625-626.)

Indeed, the receipt and consideration of evidence for such an explanation of a patent description was specifically approved by this Court in *Stewart v. United States* (1942) 316 U.S. 354, in the following language:

> "[T]o explain the meaning and extent of a decree is not to attack it for error, but to reconcile all of the descriptive language used to designate the tract title to which is confirmed.
>
> "We are of the opinion that the evidence in question was of probative value [and] that its reception and consideration did not run counter to the rule that the decree of confirmation was not open to attack by reason of erroneous description of the land confirmed. . . ." (316 U.S. at 363.)

Thus the evidence of the historical existence of Ballona Lagoon serves only to reconcile the ambiguity between Commissioner Drummond's decision and the La Ballona

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[13]That what the survey and patent termed an "inner bay" in 1858 and 1873 respectively was indeed an arm of the sea is not subject to doubt; a bay is by definition an arm of the sea. Petitioner questions the California Supreme Court's use of a 1951 dictionary definition for this determination (Pet., p. 17, n. 20), but the definition of "bay" has remained unchanged in the last 150 years. In 1832, Noah Webster wrote, "bay . . . a recess or *arm of the sea*." (Webster, A Dictionary of the English Language (1832) p. 47; emphasis added.)

patent. Taken alone, the patent requires no explanation; it unambiguously describes and depicts an "inner bay," a portion of which is the Ballona Lagoon of today. Furthermore, the fact of the lagoon's existence could not constitute a collateral attack on petitioner's patent. The lagoon exists. It is a part of the land that petitioner owns, and the quality of its title is no different from that conveyed by Mexico and confirmed by the United States.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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